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No. 89-1296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION, INC.,
POWERSMITH COGENERATION PROJECT,
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT BRIEF IN OPPOSITION OF WILLIAMS NATURAL GAS COMPANY, SMITH COGENERATION, INC., AND POWERSMITH COGENERATION PROJECT, LIMITED PARTNERSHIP

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QUESTIONS PRESENTED

1. Does Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), preclude collateral litigation between parties of issues that could and should have been raised before FERC but intentionally were not as a tactical ploy to undermine FERC policy?

2. In an enforcement proceeding brought pursuant to Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h), may a lower federal court enjoin a state court judgment barring enforcement of a FERC certificate, where the state court decision constitutes an impermissible collateral attack upon the FERC certificate in violation of the Natural Gas Act's exclusive jurisdictional framework for the review and enforcement of FERC orders?

RULE 29.1 LISTING

The parent of respondent Williams Natural Gas Company is The Williams Companies, and affiliates or subsidiaries (except wholly-owned subsidiaries) are:

BankOklahoma Corp.
Kern River Gas Supply Corporation
Kern River Service Corporation
Apco Argentina Inc.
Apco Properties Ltd.
Northwest Border Pipeline Company
Texasgulf, Inc.

Respondents Smith Cogeneration, Inc., and PowerSmith Cogeneration Project, Limited Partnership ("PowerSmith"), do not have any parents or subsidiaries. The partners in PowerSmith, and the parents, affiliates or subsidiaries (except wholly-owned subsidiaries) of those partners are:

John Hancock Mutual Life Insurance Company
PacifiCorp
Prudential Insurance Company of America
Essex Syndicate, Inc.
John Street Syndicate
Niagara Mohawk Power Corporation
HYDR -CO, Enterprises, Inc.
Beebe Island Corporation
HCE Dodge Falls, Inc.
HCE Imperial Valley, Inc.
HCE Pepperell, Inc.
HCE-Salt City Power, Inc.
HYDRA-CO Generation, Inc.
HYDRA-CO Operations, Inc.
McReau Manufacturing, Inc.
Power Mining, Inc.
New Bern Energy Recovery, Inc.

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JOINT BRIEF IN OPPOSITION OF WILLIAMS NATURAL GAS COMPANY, SMITH COGENERATION, INC., AND POWERSMITH COGENERATION PROJECT, LIMITED PARTNERSHIP

Respondents Williams Natural Gas Company, Smith Cogeneration, Inc., and PowerSmith Cogeneration Project, Limited Partnership, respectfully request this Court to deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Tenth Circuit's opinion in this case. That opinion is reported at 890 F.2d 255.

STATEMENT

This case arises from the efforts of Oklahoma Natural Gas Company (ONG) to prevent a new cogeneration plant from obtaining a competitive gas transportation service from an interstate pipeline, although the Federal Energy Regulatory Commission (FERC) has authorized that interstate service, finding it required by the public convenience and necessity under Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e). PowerSmith Cogeneration Project, Limited Partnership (PowerSmith), is the developer of an $84 million, 110-megawatt cogeneration facility on the grounds of the Firestone Tire and Rubber Company plant in Oklahoma City, Oklahoma.[1] The cogeneration facility burns large quantities of natural gas to generate electricity for sale to a local electric utility and also to cogenerate steam for use in the manufacture of tires at Firestone's plant. PowerSmith contracted for the purchase of natural gas from Ladd Gas Marketing, Inc.

PowerSmith initially sought to obtain transportation of the natural gas from ONG. Although ONG holds a non-exclusive franchise for the sale and distribution of natural gas in Oklahoma City, the rates and terms of service under which ONG provides transportation services to consumers are not regulated. ONG was unwilling to offer transportation services to PowerSmith on competitively priced terms.

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[1] Respondent Smith Cogeneration, Inc., is the general partner in PowerSmith, and is denoted jointly as "PowerSmith," along with the partnership.

The federal statutory scheme governing cogeneration projects is set out in Section 210 of the Public Utility Policies Act of 1978, 16 U.S.C. § 824a-3(a). Pursuant to this authority, FERC certified PowerSmith's project as a "qualifying cogeneration facility." *Firestone Cogeneration*, 33 FERC (CCH) ¶ 62,481 (1985); *PowerSmith Cogeneration Project*, 42 FERC (CCH) ¶ 62,121 (1988).

Accordingly, PowerSmith sought transportation services from Williams Natural Gas Company (Williams), an interstate natural gas pipeline with facilities located about 12 miles from the cogeneration plant. Williams is subject to comprehensive regulation by FERC and, pursuant to such regulation, is required to provide transportation to the public on an open-access, non-discriminatory basis.[2] In contrast to ONG, Williams was willing to provide transportation on terms acceptable to PowerSmith. However, in order to construct the 12-mile pipeline to the cogeneration plant, Williams was required to apply for and obtain a certificate of public convenience and necessity from FERC pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c).

1. Unwilling to accept its loss in the marketplace of PowerSmith's business, ONG sought to undermine the results of competition through a strategy of piecemeal litigation. While Williams was in the process of obtaining final state environmental approvals before filing its certificate application at FERC, ONG filed a petition in state court for a declaratory judgment that Williams may not serve PowerSmith without first obtaining a franchise through an election of the voters in Oklahoma City.[3] Then, when Williams filed its certificate application at FERC ten days later, ONG intervened in op-

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[2] In the mid-1980's, FERC embarked upon a fundamental restructuring of the regulatory framework governing interstate natural gas transportation, the principal purpose of which is to enhance competition. *See Associated Gas Distrib. Co. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). As part of this program, FERC adopted regulations providing for open-access, non-discriminatory transportation by interstate pipelines. 18 C.F.R. §§ 284.8(b), 284.9(b) (1989).

[3] As Justice Brandeis explained in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 282-83 n.2 (1932) (dissenting), "[b]efore the advent of the certificate of public convenience and necessity, similar but less flexible control over the entry of many public utilities into business was exercised through the grant of franchises, municipal or state."

position and protested, arguing, among other things, that Williams' service should be subject to local regulation, either in place of or in addition to FERC regulation (Resp. App. 7a-13a, 22a). ONG asserted that, even if FERC had jurisdiction, concurrent local regulation was justified because local concerns were posed by Williams' efforts to serve a customer "in the heart of ONG's service territory" (*id.* at 13a).

While ONG was opposing Williams at FERC, the state court bifurcated the declaratory judgment action, first proceeding to decide the question whether Williams would be required by state law to obtain a franchise in an election of the voters before serving PowerSmith. The state court deferred briefing and consideration of whether, if the state law franchise requirement were found applicable to Williams' service to PowerSmith, it would be preempted by the Natural Gas Act or the FERC certificate.

FERC and the state court both issued their initial decisions on February 16, 1989. FERC granted Williams' certificate application and rejected ONG's opposing arguments (Pet. App. 45a-61a). FERC found, contrary to ONG's claim, that Williams would be providing interstate, not intrastate, service to PowerSmith (*id.* at 52a-55a), and that state authorities could not "effectively regulate[]" this transportation service, given the flow of natural gas across state lines (*id.* at 54a n.15). FERC also rejected ONG's claim that Williams' service posed essentially local concerns and therefore should be subject to local regulation. FERC held (*id.* at 54a-55a) that

> irrespective of any local effects resulting from the by-pass, we believe that the transportation service at issue here essentially concerns federal interests, that is, those embodied in developing interstate transportation policy that provides consumers with a variety of supply options by promoting a competitively priced spot market for natural gas.

Applying its broad mandate to determine the national public interest in energy policy, FERC refused "to shield" ONG "from the forces of competition" (*id.* at 58a). FERC specifically recognized that authorizing Williams to construct the pipeline to PowerSmith's plant "will result in the gas being transported by [Williams] directly to an end user located in ONG's distribution area" (*ibid*). As FERC determined, however, this simply was the result of ONG losing the competition for PowerSmith's business (*ibid*). Finding no "evidence of unfair competition," FERC held that "the public interest is best served by allowing the market to determine who will provide service" (*ibid*). FERC also found that Williams' service to PowerSmith would benefit not only the parties to the transactions, but also the citizens and general economy of Oklahoma (*ibid*). In sum, FERC granted Williams a certificate (*id.* at 61a) based on the determination under Section 7(e) that the public convenience and necessity "required" Williams to compete with PowerSmith. 15 U.S.C. § 717f(e).

In contrast to FERC's holding that the public interest and federal policy required ONG to be subject to competition from Williams, the state court held that the purpose of the state law franchise requirement was to insulate ONG from competition from non-franchisees. Accordingly, the state court held that Williams could not provide gas transportation services to PowerSmith in competition with ONG until Williams first obtained a franchise through an election of the voters in Oklahoma City. Pet. App. 22a-24a. The state court reserved disposition of the preemption issue pending further briefing (*Id.* at 24a).

On March 1, 1989, ONG sought rehearing of the FERC certificate pursuant to the detailed review procedures set forth in Section 19 of the Natural Gas Act, 15 U.S.C. § 717r. In addition to its public policy conten-

tions, ONG argued that, even if Williams' proposed pipeline was subject to FERC certificate regulation, it still was subject to concurrent local regulation (Resp. App. 33a-35a). ONG claimed that Williams' service to PowerSmith was "a situation of essentially local concern" (*id.* at 34a) because Williams' effort to compete within ONG's service territory allegedly could adversely affect the rates ONG charges its other customers (*id.* at 21a-22a, 27a-29a, 34a-35a). ONG also urged FERC to defer action on Williams' application pending the resolution of ONG's state court action (*id.* at 32a, 37a-38a). ONG informed FERC of the state court's decision that Williams was required to obtain a state law franchise in order to use the city streets for the construction and operation of the pipeline to PowerSmith (*ibid.*). ONG then claimed (*id.* at 38a) that

> [t]his action goes directly to the interests of the citizens of Oklahoma City. The Commission should defer its action in this case pending the result of that [state court] decision because of its effect on the people most interested in it—the people who must live with its results on a daily basis.

While ONG's request for rehearing was pending at FERC, Williams accepted its FERC certificate and sought enforcement by filing a complaint in the United States District Court for the Western District of Oklahoma. Invoking the court's federal eminent domain authority under Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h), Williams sought to condemn rights-of-way across Oklahoma City streets necessary to construct and operate the pipeline to PowerSmith. Williams also sought to quiet its title to these rights-of-way against ONG's countervailing assertion of state law franchise rights. Pet. App. 93a-99a. PowerSmith intervened in support of Williams. ONG opposed Williams' complaint, but Oklahoma City, the owner of the property, did not.

On April 18, 1989, the district court issued an order granting Williams "immediate possession" of the rights-

of-way for the purpose of constructing the pipeline pursuant to the FERC certificate (Pet. App. 33a-34a). Ten days later, however, upon ONG's motion, the state court issued a temporary restraining order (TRO) enjoining Williams from constructing or operating the pipeline. On the next business day, the district court "stayed" the state court's TRO to the extent it prevented Williams from constructing the pipeline, on the grounds that (i) the federal court first asserted *in rem* jurisdiction over the pipeline rights-of-way and (ii) the state court TRO directly interfered with the federal court's prior order allowing Williams to construct the pipeline (*id.* at 36a-38a). The district court, however, refused to stay the TRO to the extent it prevented Williams from operating the pipeline, instead deferring the preemption issue to the state court because that issue had "been first presented" in the latter court (*id.* at 37a). Williams then constructed the 12-mile pipeline to PowerSmith's plant.

On May 19, 1989, the state court issued its decision on preemption (Pet. App. 26a-30a). The state court found that it had jurisdiction over the parties and the subject matter, but did not address respondents' claim that ONG's state action was an impermissible collateral attack on the FERC proceedings (*id.* at 28a). The state court further found that Williams' proposed service to PowerSmith raised "essentially local concern[s]" because Williams' competition with ONG would "result[] in adverse economic effects on the local utility customers" (*id.* at 29a). On this basis, the state court concluded that the Natural Gas Act did not preempt the franchise requirement (*ibid.*). The state court permanently enjoined Williams from operating the pipeline to serve PowerSmith pursuant to the FERC certificate without first obtaining a franchise (*id.* at 30a).

Williams and PowerSmith then requested the federal district court to enjoin enforcement of the state court injunction. The district court denied relief, although it

recognized that Section 7(h) provides FERC certificate-holders with eminent domain authority "for the construction, maintenance, and *operation*" of certified pipelines (Pet. App. 39a-40a n.1 (citing 15 U.S.C. § 717f(h) (emphasis added)). The district court held that *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923), "barred" it "from addressing the question of pipeline operation" once the state court had ruled (Pet. App. 41a).

The very next day, FERC denied ONG's request for rehearing of the certificate. FERC rejected all of ONG's arguments, in particular dismissing ONG's claim of adverse local rate impacts as groundless and speculative (Pet. App. 70a). FERC also addressed the preemption issue, expressly stating that the state court's decision upholding the franchise was "erroneous" (*id.* at 65a n.5). FERC affirmed that Williams' service to PowerSmith falls within FERC's exclusive jurisdiction over interstate transportation service, leaving no room for application of the franchise requirement to protect allegedly local concerns (*ibid.*).

Williams and PowerSmith appealed the district court's refusal to enforce the FERC certificate against the state court injunction to the United States Court of Appeals for the Tenth Circuit, and they appealed the state court's franchise and preemption decisions to the Oklahoma Supreme Court. ONG sought review of the FERC certificate in the United States Court of Appeals for the District of Columbia Circuit.[4]

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[4] ONG's petition for review of the FERC certificate has been fully briefed and is scheduled for oral argument before the D.C. Circuit on March 20, 1990. On February 23, 1990, ONG filed with the D.C. Circuit a conditional motion for leave to file a supplemental brief on preemption issues, if this Court denies ONG's petition for certiorari. ONG also asked the D.C. Circuit to defer a decision on the merits until this Court acts on ONG's petition. Williams and PowerSmith opposed this motion. The appeal before the Oklahoma Supreme Court has also been fully briefed.

2. The court of appeals below reversed the district court's partial denial of injunctive relief. The court determined, upon scrutiny of FERC's orders and ONG's pleadings before FERC and the state court (Pet. App. 3a-5a, 15a-17a), that ONG's state court action was an impermissible collateral attack on the FERC certificate (*id.* at 13a-18a). Hence, the court held (*ibid.*) that ONG had violated the exclusive procedures set out for review of FERC orders in Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

In holding that ONG's state court action was an impermissible collateral attack, the court of appeals relied (Pet. App. 11a-17a) upon the reasoning of *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958). The court of appeals found that, even if ONG did not raise preemption arguments before FERC and on direct review, it could and should have raised those arguments there (Pet. App. 16a-17a). The court of appeals further found that ONG, expecting that Williams would successfully obtain a certificate at FERC, "filed its action in state court as a 'preemptive strike'" against the FERC proceedings (*id.* at 17a). This, the court held (*ibid.*), amounted to piecemeal litigation of the sort precluded by Congress in Section 19(b). The court, therefore, concluded that the district court should have enjoined the state court proceedings, leaving ONG to raise its preemption arguments, if at all, on direct review of the FERC orders (*id.* at 18a).

The court of appeals also rejected the district court's reliance on *Rooker*. The court of appeals held that, while both state and federal courts generally do have authority to decide preemption issues, that authority does not permit any court to entertain an impermissible collateral attack upon FERC orders (Pet. App. 18a-21a). In this context, the court of appeals found that *Rooker* did not apply to "shield" the state court decision from a proper exercise of federal injunctive authority (*id.* at 20a). Ac-

cordingly, the court of appeals ordered the district court to enjoin enforcement of the state court injunction against Williams' operation of its FERC-certificated pipeline (*id.* at 18a, 21a).

ARGUMENT

The court of appeals correctly decided issues that are narrowly based upon the particular facts of this case. Its decision rests upon a routine application of *City of Tacoma*, 357 U.S. 320, and does not conflict with any decision of this Court or any other court of appeals. Review by this Court, therefore, is not warranted.

1. Contrary to ONG's erroneous assertions, the court of appeals did not "effect a sharp break with [the] normal pattern" or adopt a broad new rule generally divesting state courts of jurisdiction to decide preemption issues (Pet. 13). Rather, the court simply engaged in a particularized, fact-bound application of *City of Tacoma*. The court of appeals correctly reasoned (Pet. App. 12a) that FERC's issuance of its certificate order triggered the exclusive review procedures mandated by Section 19. At that point, Section 19 required the parties to litigate "all issues inhering in the controversy" before FERC on rehearing and, subsequently, before a court of appeals on direct review of the FERC orders. *See City of Tacoma*, 357 U.S. at 336; *see also, e.g., Mississippi Power & Light Co. v. Mississippi*, 108 S. Ct. 2428, 2440-41 (1988); *Whitney Nat'l Bank v. Bank of New Orleans Bank & Trust Co.*, 379 U.S. 411, 419-22 (1965); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938); *United States v. Corrick*, 298 U.S. 435, 438-39 (1936).

ONG asserts that the court of appeals misapplied *City of Tacoma* because the preemption issue does not go to the "validity" or "lawfulness" of the FERC certificate (Pet. 15-16). But *City of Tacoma* expressly bars collateral litigation of whether a licensee is able under state

law to act pursuant to FERC authority, where the issue could and should have been raised before FERC. 357 U.S. at 336, 339. The enforceability against Williams of the state law franchise provision goes to the very heart of whether Williams satisfies Section 7(e)'s requirement of being "able and willing properly to do the acts and to perform the service proposed." 15 U.S.C. § 717f(e). The preemption issue, therefore, falls squarely within the scope of collateral litigation proscribed by *City of Tacoma.*

In essence, ONG contests the court of appeals' finding that ONG "could and should have" raised the preemption issue before FERC. The court of appeals found that ONG brought its state court action as a "preemptive strike" against the FERC proceeding (Pet. App. 17a). ONG now claims that it had no reason to anticipate that Williams would necessarily seek a certificate from FERC when it initiated state court litigation. This assertion is directly at odds with ONG's representation at oral argument to the contrary, and the court of appeals found that ONG brought the state court action in anticipation of the FERC proceeding (*id.*). This finding is reinforced by ONG's awareness of FERC's previously articulated policy of approving bypass transportation arrangements like those between Williams and PowerSmith. *E.g., American Distrib. Co.*, 37 FERC (CCH) ¶ 61,282 (1986); *see generally Kansas Power and Light Co. v. FERC*, 891 F.2d 939, 941 (D.C. Cir. 1989). The court of appeals' conclusion was shared by FERC, which in its brief as *amicus curiae* to the court of appeals characterized ONG's state court action as an "end run" around the Section 19(b) review procedures (Resp. App. 46a).

The court of appeals' finding that ONG could and should have raised preemption in the FERC proceeding also follows from the court's conclusion that ONG raised preemption before FERC "in everything but name" (Pet.

App. 15a). For example, before both FERC and the state court, ONG contended that Congress' intent in enacting the Natural Gas Act was to permit concurrent federal-state jurisdiction over interstate transportation services, such as Williams would render. *Compare* Resp. App. 13a, 22a, 33a-35a *with* Pet. App. 29a-30a; *see* Pet. App. 15a-16a. ONG claimed in both proceedings that, since Williams' transportation service to PowerSmith raises essentially local concerns, it should be subject to local regulation—if not in place of, then in addition to, FERC regulation (*ibid.*). The "local concerns" identified by ONG in both the FERC and state court proceedings involved adverse retail rate impacts that allegedly would result if Williams were able to compete with ONG for service to large industrial customers in ONG's franchised service territory. *Compare* Resp. App. 13a, 21a-22a, 27a-29a, 35a *with* Pet. App. 28a-30a. FERC, however, rejected each of ONG's arguments, holding that national concerns predominated over local concerns, that the broader benefits to the nation and Oklahoma outweighed ONG's allegations of adverse rate impact, and that those allegations, in any event, were unfounded and speculative (Pet. App. 54a-55a, 69a-70a). FERC held, moreover, that its jurisdiction over the Williams' transportation service was "exclusive" and that the state franchise requirement could not validly be applied to Williams (Pet. App. 65a n.5).[5]

On the basis of these circumstances, the court of appeals correctly recognized that ONG's arguments before

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[5] ONG errs in claiming (Pet. 20 n.17) that FERC acted gratuitously in expressing its disagreement with the state court's preemption decision. FERC stated (Pet. App. 65a) that that disagreement did not figure into its decision to grant Williams a certificate and deny rehearing. FERC, however, has authority to preempt state law through its orders, *see Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982), and that effectively is what it did here.

FERC and the state court were hardly as discrete as ONG now claims (Pet. 14-16). Rather, the court of appeals determined that ONG's arguments to FERC were "laced with the theme of conflict between state and federal regulation" (Pet. App. 15a). ONG intentionally avoided articulating its argument before FERC in preemption terms to forestall an expected adverse ruling by FERC on that issue, as part of a strategy to undermine FERC authority with state court litigation.[6] Mere litigation strategy, however, does not defeat the rule against collateral attack; it is the very reason for that rule. Upon examination of the pleadings and circumstances, the court of appeals held that ONG's preemption argument was little more than a restatement of its claims before FERC, submitted under a new caption. *Cf. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) (litigants do not avoid exclusive federal authority by "mere artful pleading"). In this context, the court of appeals correctly concluded that ONG could and should have litigated the preemption issue before FERC. There is no reason for this Court to disturb that finding.

Unable to overcome the findings of the court of appeals, ONG advocates an unwarranted narrowing of *City of Tacoma*. In ONG's view, *City of Tacoma* does no more than prevent a litigant from raising in collateral litigation issues it actually presented in a prior agency proceeding. To ONG, *City of Tacoma* rests narrowly upon principles of issue preclusion or collateral estoppel. But the language of the decision is directly to the contrary. The Court expressly held that the requirement of "statutory finality" set out in the agency's exclusive review provisions "need not be labeled *res judicata*, estoppel, col-

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[6] Before ONG initiated its state court action, FERC already had rejected assertions, like that made by ONG, that states may exercise concurrent jurisdiction over bypass transportation arrangements such as those at issue here. *E.g., Mojave Pipeline Co.*, 42 FERC (CCH) ¶ 61,351, at 61,001-02 (1988).

lateral estoppel, waiver or the like." 357 U.S. at 336-37. *City of Tacoma* bars collateral litigation of *all* issues "inhering in the controversy" between the litigants, including preemption issues, which could and should be raised in the agency proceeding. 357 U.S. at 336. Indeed, it was a preemption issue that the Court in *City of Tacoma* barred from collateral litigation. *See* 357 U.S. at 332-33, *rev'g City of Tacoma v. Taxpayers*, 307 P.2d 567, 576-77 (Wash. 1957).[7]

ONG further errs in suggesting that FERC "apparently" disagrees with the court of appeals' application of *City of Tacoma* (Pet. 20-21). As noted, FERC held that it was exercising *exclusive* jurisdiction over Williams' transportation to PowerSmith with the effect of displacing the state franchise requirement (Pet. App. 65a n.5). Nowhere did FERC suggest that it was permissible for

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[7] ONG also errs in seeking (Pet. 21) to limit *City of Tacoma* to cases involving Section 9 of the Federal Power Act, 16 U.S.C. § 802. Contrary to ONG's assertion, the Court based its rationale in *City of Tacoma*—not on Section 9—but on the language of the exclusive review provisions of Section 313(b) of the Federal Power Act, 16 U.S.C. § 824*l*(b), which is identical to Section 19(b) of the Natural Gas Act. In any event, certificate proceedings under the Natural Gas Act involve much the same showing as do hydroelectric licensing cases under Section 9 of the Federal Power Act. Section 7(e) of the Natural Gas Act requires that certificate applicants must be found "able . . . to do the acts and to perform the service proposed," 15 U.S.C. § 717f(e), and FERC's regulations implementing the Natural Gas Act, 18 C.F.R. §§ 157.6(b)(5), 157.14(a)(2) (1989), require certificate applicants to supply information with respect to compliance with other regulatory requirements, such as those imposed by state law. It is no wonder, then, that lower courts have not hesitated to follow *City of Tacoma* in Natural Gas Act cases. *See Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1566 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987). In this case, moreover, ONG itself placed the validity of the state franchise requirement before FERC by arguing (Resp. App. 23a, 37a-38a) that FERC was required to defer action in light of the state proceedings.

the state court in this case to rule on preemption and to overturn FERC's exercise of exclusive jurisdiction. Indeed, FERC said just the opposite in its brief as *amicus curiae* to the court of appeals, arguing that "unless overturned," the state court decision would "unlawfully render unenforceable the Commission's orders . . ." (Resp. App. 40a). FERC further stated that, in bringing the state litigation, ONG attempted "to evade [a] proper resolution of its concerns" under Section 19(b) "by an end run to an inappropriate state forum" (*id.* at 46a). FERC, then, expressly advocated the finding, adopted by the court of appeals, that ONG had mounted an impermissible collateral attack on the certificate.

In light of the foregoing, there is no foundation for ONG's claim (Pet. 11-12, 21) that the necessary result of the court of appeals' decision is to compel litigants to raise all preemption issues at FERC. Nor is ONG correct in contending (Pet. 22) that that decision creates uncertainty for litigants. To the contrary, the court of appeals has merely reaffirmed the clear mandate of *City of Tacoma* prohibiting collateral attacks and the kind of gamesmanship conducted by ONG in this litigation. This application of *City of Tacoma* is correct and narrowly based on the particular circumstances of this case.[8]

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[8] ONG, thus, misconstrues the holding of the court of appeals and of this Court in *City of Tacoma* when it cites (Pet. 18-19) to other cases in which courts decided preemption issues outside the context of a FERC proceeding. None of those cases involved the collateral litigation of an issue "inhering in the controversy" which could and should have been raised in an ongoing agency proceeding. In any event, those cases do not address collateral attack arguments, and therefore do not directly conflict with the court of appeals' decision. Nor does *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961), suggest a contrary result. As the court of appeals noted (Pet. App. at 20a n.12), *Pan American* did not involve collateral litigation brought to undermine FERC authority. The *Pan American* court specifically stated that the case did not raise any issue regarding whether the private contract rights at issue were "reinforc[ed] or abrogat[ed]" by the Natural Gas Act. 366 U.S. at 664. *Pan*

2. Finally, ONG is wrong when it asserts that the lower federal court was without power to enjoin the state court's interference with the FERC certificate. As the court of appeals recognized (Pet. App. 19a-20a), federalism is a two-way street. State courts, accordingly, are prohibited from enjoining ongoing federal proceedings. *Donovan v. City of Dallas*, 377 U.S. 408 (1964). Here, as the court of appeals found (Pet. App. 18a-20a), the state court effectively enjoined the FERC certificate, thus arrogating to itself the appellate review of FERC orders which Section 19(b) places within the exclusive jurisdiction of the United States courts of appeals on direct review. The state court's action, therefore, violated the Natural Gas Act's exclusive framework for the review and enforcement of FERC orders, *see* Sections 19(b) and 7(h), 15 U.S.C. § 717r(b), § 717f(h), thereby undercutting the uniformity of federal regulatory policy over the natural gas industry which that framework is designed to protect.[9]

a. Contrary to ONG's claim (Pet. 24), the lower federal court was fully authorized to enjoin the state court's interference with exclusive federal jurisdiction. The federal eminent domain proceedings in this case fall within the *in rem* exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641 (1977) (plurality opinion); 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4225 (1988 & Supp. 1989). Although ONG neglects to mention it, the federal district court initially granted

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American, therefore, did not involve any of the concerns of statutory finality, uniformity of federal regulation and avoidance of piecemeal litigation that were so prominent in *City of Tacoma*.

[9] FERC has applied the pro-competitive policies given effect here throughout the nation by approving bypass arrangements that result from fair competition. *E.g., Northern Natural Gas Co.*, 46 FERC (CCH) ¶ 61,270 (1989); *Cascade Natural Gas Corp. v. Northwest Pipeline Corp.*, 46 FERC (CCH) ¶ 61,077 (1989). The decision of the court of appeals prevents impermissible collateral litigation from disrupting this national pro-competitive policy.

partial injunctive relief to Williams and PowerSmith by "stay[ing]" the state court's TRO (Pet. App. 36a-37a). The district court found that it was the first to exercise *in rem* jurisdiction over the easements needed by Williams to cross Oklahoma City streets with its pipeline, and concluded that the state court's TRO interfered with the federal court's priority of *in rem* jurisdiction (*ibid.*). ONG never appealed this finding.

The district court erred, however, in refusing to grant full injunctive relief against the state court's consideration of the preemption issue. The district court granted an injunction to ensure that Williams could construct its pipeline as ordered by FERC, but did not extend the injunction to ensure that Williams could *operate* its pipeline as ordered by FERC (Pet. App. 37a, 39a-40a n.1). In failing to do so, the district court violated Section 7(h), which ensures certificate-holders the rights necessary to "construct, *operate*, and maintain" FERC-certificated pipelines. 15 U.S.C. § 717f(h) (emphasis added). As a result, the district court failed to grant Williams condemnation authority sufficient to give effect to the public purpose of the FERC certificate. *See Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir.), *cert. denied*, 340 U.S. 829 (1950) (Congress enacted Section 7(h) to ensure that the Natural Gas Act's "full statutory scheme of control and regulation could be made effective").

b. Furthermore, neither the Full Faith and Credit Statute, 28 U.S.C. § 1738, nor the *Rooker* case required the court of appeals to give preclusive effect to the state court's decision. This is not a case where the federal and state courts properly have concurrent jurisdiction, so that the first judgment may have preclusive effect in the other proceeding. Here, the federal courts have priority of *in rem* jurisdiction and, therefore, have "exclusive jurisdiction to proceed." *Donovan*, 377 U.S. at 412 (citing *Princess Lida v. Thompson*, 305 U.S. 456, 465-68 (1939)).

Moreover, under *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-81 (1985), federal courts need accord no more preclusive effect to a prior state court decision than that decision would receive under state law. As do most state courts, *see id.* at 382, the Oklahoma courts require jurisdictional competency as a prerequisite to giving preclusive effect.[10] Further, they give particular attention to whether preclusive effect would "disturb 'the scheme of remedies' " afforded under a federal agency's organic statute. *Dority v. Green Country Castings Corp.*, 727 P.2d 1355, 1360 (Okla. 1986) (quoting Restatement (Second) of Judgments § 83(3) (1982)); *accord*, Restatement (Second) of Judgments §§ 12(2), 28 and 86(2) (1982). Here, the state court lacked subject matter jurisdiction to entertain ONG's impermissible collateral attack on the FERC certificate orders (Pet. App. 12a-15a).[11] For this reason, too, the state court decision is not entitled to preclusive effect.

In any event, preclusion was not required here because the Natural Gas Act creates an exclusive jurisdictional scheme. That statute gives FERC exclusive jurisdiction over the interstate transportation of natural gas as part of a comprehensive regulatory framework designed to

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[10] *See Dana P. v. Oklahoma*, 656 P.2d 253, 256-57 (Okla. 1982) ("[i]t is elementary" that preclusive effect is not given to final "judgments which are void for lack of personal or subject matter jurisdiction," where the jurisdictional defect is apparent on the record); *accord*, Restatement (Second) Judgments § 26(1)(c) (1982). The record in the state court case included the ONG pleadings and FERC orders on which the court of appeals relied in finding that ONG was engaged in an impermissible collateral attack.

[11] Natural Gas Act § 19(b) (court of appeals on direct review has "exclusive" jurisdiction); *e.g.*, *Whitney Bank*, 379 U.S. at 419-22; *City of Tacoma*, 357 U.S. at 336 (statutory review procedures "preclude[] . . . all other modes of judicial review," including state court litigation); *Bethlehem Shipbuilding*, 303 U.S. at 48-50) (court acting outside exclusive review procedures lacks jurisdiction); *Corrick*, 298 U.S. at 438.

achieve uniform national policy. *E.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-05 (1988). Also to ensure uniformity, the Natural Gas Act provides an exclusive framework for the review and enforcement of FERC orders. *Cf., e.g., City of Tacoma*, 357 U.S. at 335-37. This Court and the lower federal courts have repeatedly declined to give preclusive effect to state court decisions which encroach upon areas of exclusive federal jurisdiction.[12] Thus, the court of appeals below correctly required enforcement of the FERC certificate pursuant to Section 7(h), despite ONG's attempted "end run" around the exclusive federal statutory framework.[13]

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[12] *See, e.g., Brown v. Felsen*, 442 U.S. 127, 134-39 (1979); *Kalb v. Feuerstein*, 308 U.S. 433, 438-44 (1940); *Southern Union Co. v. FERC*, 857 F.2d 812, 816 (D.C. Cir. 1988), *cert. denied*, 58 U.S.L.W. 3526 (Feb. 20, 1990); *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 111-15 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1528 (1989); *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *A.L.T. Corp. v. Small Business Admin.*, 801 F.2d 1451, 1455, 1462-63 (5th Cir. 1986); *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 63 (2d Cir. 1986) (citing *Lyons v. Westinghouse Elec.*, 222 F.2d 184 (2d Cir.) (L. Hand, J.), *cert. denied*, 350 U.S. 825 (1955)); *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985). *See generally* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §§ 4428, 4469-70 (1981 & Supp. 1989).

ONG errs in suggesting (Pet. 26-27) that *Kalb* may have lost its vitality. This Court specifically relied on *Kalb* as recently as *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388, 393-94 n.11 (1986). Indeed, the rationale of *Kalb* has particularly strong application to the facts of this case, where there is a "need to protect actual pending federal proceedings" before FERC, on direct review of the certificate, and in the Section 7(h) enforcement proceedings. 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4428, p. 285 (1981 & Supp. 1989).

[13] ONG also errs in arguing (Pet. 24-25) that the court of appeals was required to give preclusive effect to the state court's indication that it had jurisdiction. Obviously, the state court cannot, merely by claiming jurisdiction, overturn Congress' exclusive scheme for federal jurisdiction under Section 19(b) of the Natural Gas Act. The state court's jurisdictional finding is entitled to no

Nor does *Rooker* compel a different result. The court of appeals merely safeguarded Williams' ability to exercise its Section 7(h) eminent domain authority. The court did not purport to assert appellate review over the state court decision. *Rooker* does not prevent the federal courts from granting federal statutory remedies under the Natural Gas Act's exclusive scheme where, as here, the state court's decision is not entitled to preclusive effect. *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §§ 4469-70 (1981 & Supp. 1989). Moreover, as the court of appeals explained (Pet. App. 18a-21a), the state court injunction violated the principles of comity and federalism that underlie *Rooker*. The court of appeals' holding in this regard is reinforced by FERC, which stated that the state court injunction constituted a serious impediment to federal authortiy (Resp. App. 44a-47a). Accordingly, the court properly refused to allow *Rooker* to "shield" the state court's interference with the Natural Gas Act's exclusive framework for the review and enforcement of FERC orders (Pet. App. 20a).[14]

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more preclusive effect than its substantive holding. *See* pp. 18-19, *supra*. In any event, preclusive effect is particularly inappropriate here. Williams and PowerSmith repeatedly argued in state court that ONG's claims were an impermissible collateral attack on the FERC certificate orders, which the state court lacked jurisdiction to entertain. The state court did not even address these important concerns involving exclusive federal jurisdiction (Pet. App. 28a), but at most might be deemed (Pet. 22-23 n.20) to have rejected them by its silence.

[14] This same reasoning demonstrates ONG's error in relying (Pet. 24) on *Younger v. Harris*, 401 U.S. 37 (1971). This case presents the opposite of the concerns at root in *Younger*. Here, a state court impermissibly disregarded an exclusive federal statutory scheme in an attempt to veto the results of national energy policy as determined by FERC. The principles of federalism and comity, articulated in *Younger*, operate here to protect the integrity of this exclusive federal framework, just as in other cases they operate to protect the integrity of legitimate state litigation.

Finally, ONG errs in arguing (Pet. 26-27) that this Court should grant review in order to clarify unsettled questions. As is evident from the cases cited above (pp. 19-20, *infra*), there is no conflict or confusion in the decisions of this Court or the lower courts on these issues. Indeed, this Court recently denied certiorari in *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, 58 U.S.L.W. 3526 (Feb. 20, 1990), which is referenced in ONG's petition (Pet. 28 n.23). This case presents even stronger reasons than *Consolidated* for denying preclusive effect to a prior state court decision, because the latter case did not involve the collateral attack and *in rem* principles given effect here. In any event, *Consolidated* merely provides further indication that the lower federal courts have properly and uniformly resolved the relevant issues, and that certiorari should be denied here as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 14, 1990

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APPENDIX A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP89-93-000

WILLIAMS NATURAL GAS COMPANY

MOTION TO INTERVENE, PROTEST AND MOTION TO DISMISS OF OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK INC.

[Filed Nov. 29, 1988]

Pursuant to Rules 214 and 211 of the Federal Energy Regulatory Commission's (Commission's) Rules of Practice and Procedure (18 CFR §§ 385.214, 385.211), Oklahoma Natural Gas Company, a division of ONEOK Inc. (ONG) respectfully submits this Motion to Intervene, Protest and Motion to Dismiss in the above-captioned proceeding.

I.

Communications and correspondence with regard to this motion should be addressed to:

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II.

Oklahoma Natural Gas Company, a division of ONEOK Inc., is a Delaware Corporation authorized to operate in Oklahoma. ONG is a gas public utility engaged in furnishing natural gas service to more than 265 communities in Oklahoma, serving in excess of 644,000 residential, commercial, and industrial customers. Its utility operations and its rates, services, practices and charges in connection therewith are subject to regulation by the Oklahoma Corporation Commission.

Williams Natural Company (Williams) is an interstate natural gas pipeline company subject to regulation by the Commission.

The PowerSmith Cogeneration Project Limited Partnership (PowerSmith) is a Delaware limited partnership which is constructing a 106 MW combined topping-cogeneration plant near the Firestone Tire and Rubber plant located in Oklahoma City, Oklahoma.

III.

Description of the filing

On October 28, 1988 Williams filed an application in the above-named docket pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Regulations for authorization to construct, own and operate approximately 12.4 miles of 12-inch diameter pipeline with related facilities in order to connect its existing facilities, located in Cleveland County, Oklahoma, with a new cogeneration power plant which PowerSmith is constructing in Oklahoma County, Oklahoma and for approval of a special rate relating to the transportation by means of this line. Williams states that the facilities would be used to render gas transportation service on behalf of Ladd Gas Marketing, Inc. (Ladd) and PowerSmith pursuant to a Transportation Service Agreement, (hereinafter referred to as the Agreement, and attached

as Exhibit I to the Application) executed September 19, 1988. The facilities are estimated to cost $2,373,700.

The Agreement provides for the transportation of up to 27,400 Mcf/day on an interruptible basis to be received "at any available receipt point located on WNG's system not upstream of the interconnect between WNG's 16-inch Cement Line and its 20-inch Blackwell South Line and delivered at the PowerSmith Cogeneration Plant delivery point. The agreement is for a term of 15 years from the date of initial deliveries and can be extended for up to three additional five year periods thereafter." (Application, p. 4).

IV.

ONG's Position

ONG opposes Williams' filing for the reasons expressed in the remainder of this pleading and moves that the Application be dismissed.

V.

Basis of Opposition

1. *Background*

Williams has filed an application to construct, own and operate certain facilities. It proposes to use those facilities and, pursuant to its blanket certificate authorization, to transport gas on behalf of Ladd and PowerSmith.

Its application under Section 7(c) of the NGA requires that Williams prove that the public convenience and necessity requires the construction of these facilities. To justify the issuance of a certificate, it has the burden of establishing the market, supply, financing and other factors required to support a finding of public convenience and necessity,* including a finding that there is no better

* Williams has not sought a certificate pursuant to this Commission's Optional Expedited Certificate procedure under Section 157.100 *et seq.* of the Commission's Regulations. It will assume no risks, since Ladd has the obligation to pay all facility costs (*infra*). It must, however, carry its Section 7(c) burden.

alternative to provide the same service. *City of Pittsburgh v. F.P.C.*, 327 F.2d 741, 751 (1956).* Furthermore, Williams must demonstrate that this proposal is subject to this Commission's jurisdiction.

While Williams estimates the cost of the facilities to be approximately $2.4 million, and has developed its Exhibits N and P to the Application on such assumption, under the terms of its Agreement, the facilities could cost up to $3.3 million. (Exhibit C to the Agreement). *Furthermore, Ladd is obligated to pay for the pipeline over a 3-year period.* Thus, at the end of such period, Ladd will at least economically, if not in name, own that line.

The plant is to be constructed by General Electric Company. PowerSmith will install General Electric Company gas turbine units to generate the steam and power in the cogeneration plant. Furthermore, while no gas purchase contract has been submitted, it is clear that PowerSmith has contracted with Ladd to purchase the gas necessary to fuel the plant. Not incidentally, Ladd is a wholly owned subsidiary of General Electric Company.** Under the terms of the Agreement, it appears that virtually all of the gas which will be delivered to Williams will be produced in the State of Oklahoma. The gas is proposed to be "transported" on an interruptible basis from a list of available receipt points on Williams' system as set forth in the Agreement "not upstream of the interconnection between Company's 16-inch Cement pipeline and its 20-inch South

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* "The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the proposal." (*Id.*)

** The individual signing the contract for Ladd is Ronald G. Spence, who is President of Ladd Petroleum Corporation, which is a wholly owned subsidiary of General Electric Company. See General Electric Company's 1987 Annual Report.

of Blackwell pipeline." (Exhibit C to the Agreement, p. 8). From review of the list in Exhibit A to the Agreement, it is apparent that the gas purchase agreement requires Ladd to use Oklahoma gas. No specific gas supply reserves or volumes are dedicated to the Agreement. Exhibit C to the Agreement makes reference to a "Gas Sales Agreement between Ladd and Firestone Cogeneration Joint Venture dated August 7, 1987." Although obviously critical to an analysis of this Application, the relationships between the parties and ultimately the alleged public convenience and necessity to be served by this pipeline, no such agreement is made part of this Application.* There is no evidence that Ladd—apparently a marketing company, or broker—has real access to *any* gas reserves or supplies. This is a serious omission when it is essential that this cogeneration plant have approximately 27,400 Mcf per day (the transportation capacity of Williams' proposed facilities), for at least fifteen years. Ladd's capability to guarantee a gas supply has not been demonstrated in this Application.

Under the Agreement, Section 6 (p. 8), PowerSmith has agreed to "only include in this Agreement and use the receipt points on Company's system that are not upstream of the interconnection between Company's 16-inch Cement pipeline and its 20-inch South of Blackwell pipeline. . . . The gas in Company's pipelines at that interconnection point currently flows in a northerly direction." Notwithstanding such agreement, a review of the flow diagram in Exhibit G and the location of facilities map in Exhibit F to the Application shows that the gas which actually is going to supply the PowerSmith Cogeneration

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* ONG understands that a contract of that date was entered into between Ladd Petroleum Corporation and Firestone. The details are not available publicly. There is *no* evidence in *this* proceeding that either Ladd or Ladd Petroleum Corporation has a competent gas supply able to meet PowerSmith's requirements over a long term, which may be as long as thirty years.

Plant must be located west of the intersection of Williams' main line and thus the gas *must* come from fields located upstream of the interconnection point in Oklahoma. Williams will construct its 12.4 miles of facilities from a point of delivery on Williams' gathering system west of the interconnection for delivery to the plant. The gas will flow in an easterly direction to the point of interconnection.

Williams anticipates that it will transport the volumes of gas at 90% of contract maximum (Exh. P to the Application). However, in its cogeneration application in Docket No. QF86-36-000, attached to the Application as part of Appendix E, PowerSmith's predecessor, Firestone Cogeneration Project Limited Partnership, showed that it would operate the plant 44.32 weeks per year on a seven day week twenty four hour day basis. This equates to operation at 85.32% of contract maximum rather than 90%. This affects the economic calculations.

The gas supply, purchased, theoretically, from Oklahoma sources from Ladd, would be delivered by Williams through this new 12.4 mile lateral running from its gathering facilities in Oklahoma. And the gas would be delivered to the PowerSmith plant without having crossed any state lines.

The rate Williams proposes to charge for the transportation service is the sum of its interruptible transportation service (ITS) rate and the proposed X-23 rate, as approved by the Commission, subject to a maximum contractual rate of 17.4¢ per Mcf (including GRI and ACA charges, but excluding gathering and fuel charges) plus ½ of new transportation components that may be added in the future.

Exhibit N to the Application projects revenues for three (3) years for Williams. Neither in this Exhibit nor in the remainder of the Application is any explanation given of what happens after Ladd pays for the pipeline after

three (3) years. Williams further states that in order to meet the contractual maximum rate it will discount not the X-23 rate, but its ITS rate. This discriminatory discounting may affect other Williams' customers. Furthermore, not discounting the X-23 rate only helps Ladd as the transportation revenues received by Williams from Ladd will serve to reduce the amount Ladd will have to pay Williams at the end of three (3) years. See Section 8 to Exhibit C of the Agreement.

The *maximum* rate is 27¢ per MMbtu, which includes all charges by Williams. Nonetheless, by contract, the transportation rate to be paid by PowerSmith *will be 27¢*. (Exhibit C to the Agreement, p. 14). The rate to be paid for the gas to Ladd is not specified. Thus at the present, Williams has not provided the Commission the means to determine whether the proposal is in the public interest.

The proposal provides that as long as it can provide it, transportation for 100% of PowerSmith's requirements must be by Williams, thus limiting any possible competition for the life of the Agreement.

2. *This Transaction is Subject to Local Rather Than Federal Jurisdiction*

Unlike many bypass cases which have been presented to this Commission, the facts in this case, as set forth by Williams, demonstrate that the proposal, notwithstanding that it is cast as an application to expand service by an interstate pipeline, in fact relates to service in the nature of distribution or intrastate transportation. While there may be facts which are in dispute as to certain other aspects of this proceeding, there is no dispute about the following:

1. The gas which will serve the PowerSmith Cogeneration Plant originates in Oklahoma.

2. The gas will be delivered to PowerSmith in Oklahoma.

3. The gas delivered to PowerSmith will *never* cross state lines.

4. The facilities to be constructed are all in Oklahoma; they do not cross a state line.

5. The facilities are attached to Williams' facilities which have not crossed state lines, are all in Oklahoma and which effectively provide gathering of gas from various fields to be delivered to Williams transmission pipeline. None of the gas will have moved from a point out of the State of Oklahoma at the time it is delivered to PowerSmith.

6. The parties affected by the transportation and sale of this gas are all Oklahoma parties. The producer, the end user, the local distributor which is franchised in the area and its consumers, who will not obtain the benefit of this load, are all Oklahoma oriented.

This particular project is not in interstate commerce, which Section 7(c) of the NGA defines as commerce "between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof . . ." As this Commission recognized in *Columbia Gas Transmission Company*, 58 FPC 331, 337 (1977): "It is the transportation and sale of *natural gas* across a state line which is the basis for all Commission jurisdiction. It does not require a strained reading of the plain language of the Act to conclude that the flow of gas (rather than the flow of dollars, or revenues or impact of curtailment) across state lines is an indispensible nexus to establishment of Commission jurisdiction." The gas which is delivered to PowerSmith does not and indeed cannot cross a state line.* Logic dictates that if any agency has jurisdiction here, this particular transaction is subject to local regulation rather than that

* "Where, as here, the gas does not and indeed cannot cross a state line even as commingled, there is no basis for establishing Commission jurisdiction." (*Id.*)

of the FERC. See *Natural Gas Pipeline Company of America*, 40 FERC ¶ 61,119 (1987), discussed *infra*.

The gas is proposed to be delivered at the pressure required by the customer, not Williams. As with any distribution company customer, the service being provided is that which the customer needs and demands, not what Williams, in operating its system believes it can accommodate. Just as when ONG provides service at pressures requested by its customers, Williams is providing service at the pressure and in the volumes which PowerSmith seeks. Sometimes a customer wants gas at 5# psia pressure; sometimes 50#; sometimes 350#. But, when delivered at a local level, as it will be here, at pressures sought by the user, *it is being distributed to that customer.* Furthermore, this pipeline serves no interstate function and does not enhance interstate operations since Williams' interstate pipeline will continue to operate as it always has with or without this distribution spur line. Under the terms of the Agreement Ladd has agreed to only include receipt points "not upstream of the interconnection . . ." By contract, the points of receipt are downstream or otherwise "not upstream of the interconnection." The gas used to supply the plant, notwithstanding the contract, *must* come from points upstream of the point of interconnection with the plant because the flow of the gas is easterly into the north-south line.*

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* See Attachment A which is a copy of a flow diagram sheet filed by Northwest Central Pipeline Corporation (now Williams) on July 15, 1986 pursuant to Section 260.8 (Format No. FERC 567) of the Commission's Regulations under the Natural Gas Act. The flow map shows the system in the location of the transaction proposed herein. The 12.4 mile pipeline will tap in to the Williams' 16-inch line which connects with gas supplies gathered from the East Niles Field in Canadian County, the Cement Field in Caddo County, the Sterling Field in Comanche and Stephens County, Oklahoma as well as the Southwest Pocasset Field in Grady County and other fields along the route of the gathering system. The pipe which gathers this gas ultimately connects with the Williams north-south line in Cleveland County *east* of the point of interconnection with the PowerSmith line (see Exhibit F to the Application).

The contractual agreement that the gas be received from Ladd at points "not upstream" of the point of interconnection* does not change the fact that all of the gas to be used in the plant physically will come from Oklahoma points upstream of the plant. *Cf. California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 396 (1965): "We said in *Connecticut Light & Power Co. v. Federal Power Comm.*, 324 U.S. 515, 529 . . . 'Federal jurisdiction was to follow the flow of electric energy an engineering and scientific, rather than a legalistic or governmental, test.' And that is the test we have followed under both The Federal Power Act and The Natural Gas Act . . ."

Accordingly, the situation here is significantly different than in the usual interstate pipeline application. The gas to be delivered will be produced entirely within Oklahoma. The gas is delivered in Oklahoma before it is ever commingled with any other gas stream. The facilities which are to be constructed are off of the natural gas company's gathering system within the State of Oklahoma and the gas is delivered to PowerSmith for consumption entirely within the State of Oklahoma.

ONG does not suggest that an interstate natural gas company is not seeking to construct facilities here. Obviously, Williams is doing so. However, the facts in this particular case are unique and dictate that the facilities extend from Williams' gathering system, rather than its interstate pipeline system and that the facilities are being used to distribute gas. As such, the facilities are local in nature and should be subject not to FERC jurisdiction, but rather to local regulation, because it is transportation as an intrastate pipeline and it is local distribution.

Adding emphasis to this particular situation is the unique structure of the Agreement between Williams, PowerSmith and Ladd (see Exhibit I to the Application). As shown in Section 8 of Exhibit C to the Agreement,

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* As shown in Exhibit A to the Agreement, virtually all of those receipt points are in Oklahoma.

Williams will construct the facilities necessary to connect its system to the PowerSmith Plant. *Ladd* agrees to pay to Williams "the total amount of out-of-pocket costs actually incurred by Company in connection with construction of these pipeline facilities . . . including fees . . . and reasonable outside legal fees, plus a reasonable allocation for overhead and administrative expenses (out-of-pocket facility costs) . . . not to exceed $3.3 million." The transportation rate monies which are paid for three years "shall be applied to Ladd's payment for the out-of-pocket facility costs." Should the transportation charges which are paid by Ladd over the three year period be less than the out-of-pocket facility costs at the end of the period, Williams "will invoice Ladd for the amout of the unpaid out-of-pocket facility costs and Ladd will pay to Company within thirty (30) days after receipt of such invoice the unpaid out-of-pocket pipeline facility costs." Even if the Agreement should be terminated, Ladd is liable to pay Williams for its out-of-pocket costs. It is of interest to note that Williams has indicated that it will not discount the X-23 rate. As noted earlier, this procedure helps only Ladd, as it reduces the amount Ladd pays to Williams at the end of the three year term. It cannot help either PowerSmith or Williams' other customers.

The net result is that after three years, Williams will have absolutely no investment in the facilities which are to be constructed. From an economic perspective, the facilities will belong to Ladd. Left open is the question as to what payment thereafter will be made by Ladd or PowerSmith for the use of the facilities, which by that time will have a zero rate base.

Left open also is whether it is the present intent of the parties to transfer the fully paid for properties to Ladd once the three year term is over.* If that *is* the basic

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* Experience dictates that if a company had paid for goods once it will not wish to pay for them again. In this competitive world,

intent and Williams intends to sell the property to Ladd —an aspect of this proceeding which warrants investigation—then it would appear that the request for a certificate pursuant to Section 7(c) of the Natural Gas Act is an improper use of FERC and NGA authority to accomplish private purposes. It would be nothing short of a subterfuge, if true, since the certificate, if issued, would have the specific purpose of allowing the interstate pipeline to utilize Section 7(h) of the Natural Gas Act for condemnation purposes.* No intrastate pipeline, LDC or private corporation would have a similar right. And yet the nagging and unanswered question remains: Why else would an interstate pipeline, rather than the customer itself, be allowed to construct a facility, with no risk whatsoever, since the entire cost, including fees, would be paid to Williams by Ladd in three years, and nonetheless, theoretically at least, the pipeline would be entitled to recover revenues for transportation purposes.

ONG submits that a proper analysis of this transaction leads to the conclusion that intrastate transportation and/or distribution is proposed and that the facilities are intended to be part of an *intrastate* transportation distribution operation, if not at the present, then ultimately.

In a case which is similar to the instant proceeding, *Natural Gas Pipeline Company of America*, 40 FERC ¶ 61,119 (1987), the Commission found that the Commission had no jurisdiction where an industrial company was constructing two pipelines, one 36 miles long and

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such double payment leaves in question why such a payment would be made, or whether Williams intends to abandon the facilities by transfer to Ladd after three years.

* Section 7(h) was designed to assure that interstate pipelines which serve a broad public interest purpose could be built. This proposal would permit the construction of facilities which would permit the distribution of gas to only one customer.

the other 39 miles long, to connect with an interstate pipeline since the pipeline would lie wholly within the state and connect industrial plants in the same State as the interstate pipeline. See also, *Colorado Interstate Gas Company*, 49 FPC 648 (1973). In those situations, the lines were considered *not* subject to FERC jurisdiction. Similarly, in this situation, the facilities, if constructed from the tap on Williams' line by Ladd or PowerSmith, would not be subject to FERC jurisdiction. Since Ladd is paying for these facilities within three years, for all intents and purposes, Ladd is building the facilities. Under the circumstances surrounding this application, the facilities are not subject to FERC jurisdiction. This is a local matter which should be subject to local regulation. Ladd/PowerSmith should not be indirectly handed the right to condemnation simply by having Williams construct the facilities.

This case cries out for local, not federal, regulation. The delivery is to a single market—at least at present—which is in the heart of ONG's service territory. In its brief in *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), responding to arguments of the state commissions that encouraging bypass is harmful to ratepayers on the LDC's systems, the FERC assured the Court that "the states have ample authority to regulate interstate pipeline services that bypass distributors." Even if the service here were construed as "interstate pipeline service", the state commission must have jurisdiction to protect ratepayers. The fundamental purpose of the NGA is to protect consumers. If jurisdiction is to be asserted by this Commission (although we believe it should not be), it must be for the purpose of investigating the nature of the proposals, for determining if there are private unexplained arrangements which have been entered into which change the nature of the public proposal. At the minimum, a hearing is essential to look into the questions which have been propounded.

3. *ONG Provides a Better Alternative*

ONG has been distributing natural gas throughout the State of Oklahoma, including Oklahoma City, for many years. Its gas distribution system extends throughout Oklahoma City and within reach of the PowerSmith Cogeneration Plant. Unlike Ladd, ONG can *assure* a gas supply from Oklahoma sources which can meet the requirements of the plant at reasonable prices. This has been demonstrated in its annual reports * and, given the opportunity in a proceeding here, ONG would show the adequacy of its gas supply—which Ladd has yet to show is available to it.** ONG's rates are subject to regulation by the Oklahoma Corporation Commission and thus would give rate stability to PowerSmith over the long term. It should be noted that the options to extend the contract for three additional five year periods depends upon *mutual agreement*, which inevitably will mean higher costs.

ONG will show that if it is allowed to serve PowerSmith, ONG's other consumers will benefit. No such showing has been or can be made by Williams in this proceeding. ONG will show that the investment in plant which it will make to connect to the PowerSmith cogeneration plant is significantly less than the minimum of $2.4 million proposed by Williams. Thus, economies will be engendered by having ONG provide the service. ONG

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* As shown in ONEOK Inc.'s 1987 Annual Report to Stockholders, its reserve life index exceeded seventeen (17) years.

** A fundamental and long-standing requirement under Section 157 of the Commission's regulations is the demonstration of an adequate gas supply to support the proposal. See Section 157.14 (a)(10); *Kansas Pipe Line & Gas Company*, 2 FPC 28 (1939): "We are of the opinion that applicants who contend that 'public convenience and necessity' require or will require the construction of facilities for the transportation of natural gas must show that they possess a supply of natural gas adequate to meet those demands . . ." 2 FPC at 40.

will show that because it has a gas distribution network in and around Oklahoma City and the PowerSmith plant, it can provide a more assured service than anyone else. ONG is confident—and has good reason for this confidence—that its current burner tip rate to PowerSmith would be less than that incorporated in the Williams-Ladd-PowerSmith arrangement. If the difference were only 10¢ per MMBtu, PowerSmith would have $900,000 in the first year alone.

ONG has sought to find a reason why PowerSmith chose not to deal with it rather than Ladd. It is possible that the tie between General Electric's producer subsidiary, Ladd, and its investment in the construction and furnishing of gas turbines in the cogeneration plant, effectively have foreclosed competition. Since Ladd will be supplying the gas to meet the load to be served by the General Electric construction plant, there is a guarantee that it will have income and cash flow from gas sales. ONG has no certain knowledge that there is a tie between PowerSmith purchasing that gas from Ladd and the contract to construct the cogeneration plant or to supply the gas turbines. Given the opportunity, after this matter is set for hearing, it is expected that this question will be investigated. Without that investigation, the Commission and its Staff will have no opportunity to determine whether, as a result of the affiliate relationship, there has been, in fact, improper action by the parties. Following the analysis of the potential for preclusion of competition by pipelines' marketing affiliates, this Commission adopted a market affiliates rule, which is designed to preclude that from happening.* In this case, where the potential for similar harm is noted, the Commission must not ignore it.

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* Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497, issued June 1, 1988.

4. *Competitive Requirements Demand That The Application Either Be Rejected Or Set For Hearing*

It is beyond cavil that this Commission favors competition. In a series of orders, even before Order No. 380 was issued in 1983, until this time, the Commission has repeatedly taken steps to remove bars to competition. Indeed, the Chairman of the Commission has been quoted as complaining that distributors are "the last bastion" against free and open competition. But in this proceeding the parties are eliminating competition.

Section 10 of Exhibit C of the Agreement restricts transportation service competition by providing that "one hundred percent (100%) of the gas requirements of the PowerSmith Plant subsequent to the Initial Date of Commercial Operations" should be by Williams. This provision precludes *any* possible competition by ONG or others which may seek to provide less costly and more secure transportation in the future for any gas requirements of the plant. This provision surely violates this Commission's policy for free and open competition. In Order No. 380, the Commission stated: "Indeed, it has been made clear that fostering competition is not only an appropriate goal but must take a high priority in the values which the Commission considers when it determines whether rate structures are just and reasonable."

This proceeding provides the opportunity for this Commission to show that it means what it has been saying and that local distribution companies will be given the same chance to compete which they have been accused of depriving to others.

5. *Questions Which Must Be Answered*

1. Who will own the pipeline after three (3) years? If Ladd will own the pipeline, is this application not a subterfuge to obtain Federal condemnation authority?

2. Once Ladd pays for all of the costs of the pipeline what rate will Williams charge?

3. What effect will this transaction have on other Williams' customers?

4. Was competition stifled where General Electric Company, supplier of the gas turbines, owns the company that contracted to supply the gas?

5. Is a requirement to transport all gas to the plant under the transportation agreement violative of Commission policy on competition?

6. If Oklahoma gas is consumed by an Oklahoma customer through a discrete pipeline is local distribution involved?

7. Are not these facilities really local, intrastate transmission and distribution facilities?

8. Why allow discriminatory discounting of rates (the ITS rate) when the only party which will benefit from such transaction is a gas broker?

9. Is there a more feasible alternative represented by ONG's readiness, willingness and ability to provide more efficient and less costly service to PowerSmith?

10. If there is such a more feasible alternative, how can this Commission certificate the proposal by Williams?

On the basis of the foregoing, it is clear that ONG has a substantial interest in this proceeding which will be directly affected by any action ultimately taken by the Commission herein. ONG submits that its interests cannot be represented by any other party, and that it has the right to intervene herein.

WHEREFORE, ONG respectfully moves that (1) it be permitted to intervene with all rights of a party, (2)

the Commission dismiss this application, or (3) failing dismissal, the Commission set this matter for hearing.

Respectfully submitted,

OKLAHOMA NATURAL GAS COMPANY
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Its Attorneys

Dated: November 29, 1988

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP89-93-000

WILLIAMS NATURAL GAS COMPANY

REQUEST FOR REHEARING OF OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK INC.

[Filed March 1, 1989]

Pursuant to Rule 19(b) of the Natural Gas Act and Rule 713 of the Commission's Rules of Practice and Procedure, Oklahoma Natural Gas Company, a Division of ONEOK Inc. (ONG) requests rehearing of the Commission's order of February 16, 1989, which granted Williams Natural Gas Company (Williams) a Section 7(c) certificate of public convenience and necessity to construct and operate facilities to transport gas through a 12-mile pipeline in Oklahoma.* ONG has moved contemporaneously herewith for an immediate stay of that order pursuant to 5 U.S.C. § 705 in order to prevent irreparable injury while the Commission considers the rehearing request.**

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* ONG respectfully incorporates herein (1) its Motion to Intervene, Protest and Motion to Dismiss, filed November 19, 1988, (2) its Supplement to Protest, filed January 18, 1989, and (3) its Motion to Compel Responses, filed February 3, 1989. Repetition of the arguments set forth therein would unnecessarily increase paper. ONG nonetheless submits that those arguments continue to be valid.

** Should the Commission deny rehearing, ONG has requested that the stay continue until court action has been completed.

I.

SPECIFICATION OF ERRORS

In its Order of February 16, 1989, the Commission erred in the following respects:

1. The Commission erred in failing to find that the facilities proposed to be constructed and the transportation provided thereby are matters of local interest which are not subject to Commission jurisdiction, but rather are subject to the jurisdiction of the Oklahoma Corporation Commission (OCC).

2. The Commission erred in its ruling that the public convenience and necessity requires granting Williams a certificate.

3. The Commission erred in failing to set this matter for hearing.

4. The Commission erred by failing to defer to the request of the OCC to hold hearings in order to determine the jurisdictional questions involved here and to resolve other factual matters.

5. The Commission erred by failing to investigate issues raised by ONG and by failure to obtain pertinent information available only to the applicant, the end-user, and the broker involved in the transaction, when the applicant refused to provide such information to ONG.

6. The Commission erred by its failure to investigate whether the intent of the parties ultimately is to transfer title to the 12-mile line to Ladd Gas Marketing, Inc. (Ladd) or PowerSmith Cogeneration Project Limited Partnership (PowerSmith) and thus whether the sole purpose of the certificate is to obtain condemnation rights under Section 7(h) of the Natural Gas Act and, if so, to find that the Commission's process is being abused.

7. The Commission erred by failing to ascertain why the parties entered into option agreements providing for

alternate construction schemes, clearly of an intrastate nature, *after* Williams had filed its application herein.

8. The Commission erred by failing to require Williams to respond to data requests which would have helped to provide a record upon which pertinent issues could be resolved.

9. The Commission erred in failing to find that there is a better alternative to serve the end-use market proposed to be served by Williams.

10. The Commission erred by finding that there are adequate gas supplies to support the issuance of a certificate of public convenience and necessity herein.

11. The Commission erred by failing to follow established policy, without adequate explanation.

12. The Commission failed to protect the public—as contrasted to private—interest.

II.

SUMMARY OF ARGUMENT

The Commission erred in granting a certificate to Williams by failing to obtain necessary evidence, by relying on the limited information presented and failing to find that there is a better alternative to serve the markets, which benefits all Oklahoma consumers and not just the private parties involved in the Williams, Ladd, Power-Smith deal. The Commission wrongly assumes that simply because a contract was entered into, fair competition which benefits the public existed.

The Commission's failure to determine, develop and examine whether or not fair competition existed in this case is indicative of the Commission's current—and wrong—policy whereby interstate pipeline companies may, with the Commission's blessings, pick off the most lucrative customers of local distribution companies. This policy forces distribution companies, who are required to serve

all who seek service within their franchise areas, to recover fixed costs from a shrinking customer base. Further, the Commission's creation of an apparently irrebuttable presumption that direct service by an interstate pipeline is in the public interest is not consistent with the Commission's past policy pronouncements, nor compelled in any way by federal law.

The Commission erred in failing to find that Williams' proposal is local in nature and not subject to its jurisdiction. All gas used in the transaction will be produced, transported, and consumed within the State of Oklahoma. ONG submits that the Williams facilities involved are, contrary to the Commission's finding, gathering facilities. Whether or not the line is a gathering line is a question of material fact which has not been determined based on any evidence of record. The Commission erred in not holding a hearing to develop further evidence.

The proposed direct natural gas service by Williams to PowerSmith involves the "local distribution of gas," and is beyond the jurisdiction of the Commission. Congress created a dual regulatory scheme that reserved much authority to the state. At some point "interstate" transportation ends and local distribution begins, and, at that point, state jurisdiction, rather than federal jurisdiction takes over. In this way, a state is able "to manage the essentially local aspects of its business."

It is axiomatic that the Commission must hold a hearing when there are material facts in dispute. ONG has raised numerous issues which deal with questions of material fact. The Commission has wide discretion to determine whether or not to set a given matter for hearing, but its actions may not be arbitrary. In this case, the Commission has no factual foundation for its conclusion, and erred in failing to set the proceeding for a hearing to elicit the acts necessary to reach a rational decision.

The Commission erred in failing to defer action in light of a proceeding pending before the Oklahoma District Court in which the Judge has determined that Williams must first obtain a franchise from the City of Oklahoma City in order to construct facilities by use of that city's streets. The action in this proceeding goes directly to the interests of the citizens of Oklahoma City. The Commission should defer its action pending a decision made by the persons who will most be affected by this proceeding.

The Commission erred in failing to follow established Commission policy (1) with regard to its favoring local distribution companies to provide service to local markets, and (2) with regard to providing flexible receipt points for gas transported to a specific market under a Section 7 certificate authorization.

III.

BACKGROUND

This case involves an application by Williams for authorization to construct, own and operate 12.4 miles of 12-inch pipeline in order to connect its existing facilities in Cleveland County, Oklahoma, to a new cogeneration power plant currently being constructed by PowerSmith in Oklahoma City. The facilities would be used to provide transportation service through the pipeline for gas which Ladd would sell to PowerSmith. PowerSmith proposes to use the gas to provide electricity for Oklahoma Gas & Electric Company (OG&E) and steam for Firestone Tire and Rubber Company (Firestone). The proposed facilities would parallel ONG's existing distribution lines and would capture one of ONG's large industrial customers.

IV.

ARGUMENT

The Commission Erred In Finding That the Public Convenience And Necessity Required Granting Williams' Application

The Commission ruled that the public interest will be served by allowing Williams to duplicate ONG's facilities to serve PowerSmith. (Mimeo, p. 11.) In taking this action, the Commission relied primarily upon its "belief that the public interest is best served by allowing the market to determine who will provide service in cases such as this". (*Id.*)

The Commission further found that this proposal will result in benefits "to Ladd, WNG, PowerSmith, Firestone and OG&E". (Mimeo, p. 10.) This was based on the theory that Ladd and Williams would benefit from increased revenues, that PowerSmith will benefit by having "access to competitively priced gas through Ladd" and both OG&E and Firestone would benefit because OG&E would have a new source of "reasonably priced electricity and Firestone will be able to operate its tire manufacturing processes more efficiently by using the steam produced by PowerSmith". It also found that Williams' customers will also benefit and that operation of the cogeneration plant would bolster Oklahoma's economy, benefitting the residents of the state. There is no record evidence to support any of these conclusions.

In making these findings, the Commission failed to recognize that the cogeneration facility would be built and serviced by gas, quite likely at a lower cost than under the approved arrangement, even if the certificate were to be denied. Thus, the alleged "benefits" to OG&E and Firestone, as well as to Oklahoma's economy and the residents of the state, will not be enhanced by the fact that Williams, rather than ONG, is transporting the gas

to serve the PowerSmith plant. There is no showing that OG&E will purchase power from PowerSmith at any savings to OG&E. Under the Public Utility Regulatory Policies Act of 1978, the rate cannot exceed "the incremental cost to the electric utility of alternate electric energy". See 16 U.S.C. § 824a-3(b), *i.e.*, its full "avoided cost", 18 C.F.R. § 292.304(b)(2). There is no evidence in this record to show what price will be paid or what "savings" there will be to OG&E and its consumers.

In this regard, ONG has attached hereto, for the information of the Commission, a January 5, 1989 order of the Corporation Commission of the State of Oklahoma (OCC), together with a dissenting opinion dated January 20, 1989, and special concurring opinion of the Chairman of the OCC. That order makes clear that OG&E has no need for the power to be made available by PowerSmith. The Commission found "that it appears no additional capacity is required on the OG&E system until 1995, at the earliest; and that only peaking capacity would be needed at that time. . . . The Commission further finds that until such time as additional capacity is determined to be needed on OG&E's system, OG&E's maximum avoided costs are energy related only" (pp. 15-16).

In the Commission's rush to judgment in this proceeding, allegations were accepted as fact, leading the Commission to reach conclusions which are inaccurate. Had a hearing been held, evidence concerning OG&E's needs and alleged benefits to it and the consumers it serves could have been investigated. On the face of the OCC's recent order, it would appear that no benefits will accrue to OG&E. It does not now need the capacity PowerSmith will provide and, if maximum avoided costs "are energy related only", there will be no savings at all to OG&E—and questionable benefits to PowerSmith. We note that the PowerSmith-OG&E agreement, referred to in Williams' application (p. 3) is not part of the record evidence upon which the Commission apparently relied.

To the extent ONG could provide gas to PowerSmith at a lower rate than under its deal with Ladd and Williams, as ONG has alleged it could do, there would tend to be greater benefits—if there are any—to consumers in Oklahoma because both gas and electric savings would be engendered.* There is no evidence of any increased efficiency by Firestone because of receipt of steam from PowerSmith. Allegations and assumptions, without any factual foundation do not support the conclusion reached by the Commission.

The benefits to PowerSmith, Ladd and Williams are evident. They will make money out of this. The Commission totally ignores the detriments that will be imposed upon gas consumers throughout the state because ONG's market will be bypassed. ONG will lose the Firestone market, which up until this time has helped to pay the fixed costs incurred by ONG in providing service to markets throughout the state. ONG will lose the potential of serving the PowerSmith plant, which would further help to spread ONG's fixed costs over more units of gas, thus benefitting gas consumers throughout the State of Oklahoma. And, since the Commission refused to hold a hearing in this proceeding, the Commission has no basis to weigh the comparative benefits and detriments. The conclusory statements made by the Commission at pp. 10-11 have no substantial evidentiary support.

As to the Commission's position that "it is reluctant to shield local distribution companies from the forces of competition, which we have attempted to foster in the natural gas industry" (mimeo, p. 11), here the Commission simply has succeeded all too well in shielding the natural gas pipeline company, Williams, from the forces of competition. ONG sought to compete but, notwithstanding its willingness to offer at this time services at

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* This assumes that PowerSmith would pass on to OG&E the savings that would result, although there is no assurance, or even likelihood, that this is so.

some 20¢ *less* than would result from PowerSmith's deal with Williams and Ladd, its offer was ignored. No adequate explanation is provided as to why the Williams/Ladd agreement was entered into, and, notwithstanding ONG's attempt to obtain information, no evidence was developed by the Commission which would provide a clue as to the reason for the deal. The Commission simply assumes that because the contract was entered into, competition has played its hand and the public interest is served. When ONG sought to obtain information from Williams through a data request, Williams refused to answer. When ONG moved to the Commission to compel responses to the data request, the Commission simply ignored the motion and thus missed the opportunity to obtain information which would have provided some basis to answer these material factual questions. In other words, the Commission has put its blind faith in a pipeline, Williams—which has taken customers from state regulated distribution companies*—and in the assumption that fair competition, and no other motive, will direct peoples' actions.

The Commission recently has chosen consistently, in its orders permitting bypass, to ignore the impact of any particular bypass on the distribution company, which, by law, must continue to serve all customers in its franchise area at rates regulated by the state commission, as well as on the public served by that company. When a distributor's rates are established, consideration is given to sales or transportation provided to end-users. When those end-users are taken away by interstate pipeline companies, in derogation of a long-standing Commission policy favoring local distribution companies over inter-

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* This is not the only case in which Williams has sought and been successful at the Commission's instance in bypassing local distribution companies which have been committed to serve markets under state law. See, for example, *Kansas Power and Light Company v. Williams Natural Gas Company*, 45 FERC ¶ 61,272 (1988), *reh'g denied*, 46 FERC ¶ 61,—— (February 23, 1989).

state pipelines to provide service*—a policy which has not specifically been overruled by the Commission—the Commission is content to find that distributors have not been competitive and, thus, should lose the load. By these means, pipelines, which are situated near desirable end-use customers, are able to cherry pick, *i.e.*, to pick off the most lucrative end-use customers and leave the remainder to the distribution companies to seek to serve at increasingly higher rates. The Commission finds this to be fair competition and in the public interest. As a matter of policy, this is wrong. As a matter of long-term economics, when the question of market power and its effect on a distributor's ability to compete is considered, this is wrong. As a matter of fact, in this case, this is wrong.

Not only did the Commission fail to follow its long-standing local distribution companies over interstate pipelines to provide service to local markets (*supra*, p. 11), but it also failed to follow its more recently adopted policy concerning the denial of flexible receipt point authority to a pipeline transporting gas for a customer in a Section 7 proceeding. Its approach here is inconsistent with its policy, as set forth in *Southern Natural Gas Co.*, 36 FERC ¶ 61,275 (1986), *Arkla Energy Resources a Division of Arkla, Inc.*, 45 FERC ¶ 61,375, at pp. 62,178-9 (1988), and cases cited there. No explanation has been provided for this gross deviation from existing policy. If this reflects a change in policy, no explanation has been provided as to why such a change has been adopted.

The Commission may be rewriting the script under which the natural gas industry operates on its own economic theories. ONG submits that the theories have not,

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* See *Panhandle Eastern Pipe Line Co.*, 13 FPC 301, *reh. denied*, 13 FPC 1501, *aff'd Panhandle Eastern Pipe Line Co. v. FPC*, 232 F.2d 467 (1956), *cert. denied*, 352 U.S. 891 (1956); *Southern Natural Gas Co.*, 25 FPC 925, 927 (1961); *Panhandle Eastern Pipe Line Co.*, 39 FPC 581, 585 (1968); *Natural Gas Pipeline Company of America*, 34 FPC 771, 783 (1965); *Transwestern Pipeline Co.*, 36 FPC 176, 201 (1966).

in this case, been shown to have any valid basis. There is no evidentiary support for the Commission's conclusions that this kind of competition is desirable. The mere conclusion that this is so does not provide a substantive basis to overrule a policy which has been in effect over a long period of time. By ignoring the need to test these questions on an open record in this case, the Commission has denied ONG an opportunity to be heard in order to show where the public interest lies. ONG has a public ultility duty to serve the consumers in Oklahoma in the most reasonable manner at the lowest reasonable cost. It cannot do so if it is exposed to having its major loads taken by interstate pipelines whose market power allows them to intrude upon essentially local concerns without any consideration of underlying factual matters. In addition to increasing ONG's unit cost of service, loss of loads such as Firestone will tend to increase ONG's exposure to take-or-pay costs, and thus to further burden Oklahoma consumers.*

The Commission's creation of an apparently irrebutable presumption that direct service by an interstate pipeline is in the public interest is not consistent with its pronouncements in its Order No. 436 proceedings, see *Regulation of Natural Gas Pipelines After Partial Wellhead Deregulation*, 50 Fed. Reg. 52217, 52263 (December 23, 1985) (Order No. 436-A), nor is it compelled by any changes in federal law. See *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1045 (D.C. Cir. 1987) (Mikva, Jr., concurring in part and dissenting in part). The Commission, discussing optional expedited certificates (OEC) and protests by State Commissions and local distribution companies (LDC's) that such procedures would lead to bypass of LDC's stated:

> The Commission has frequently exercised its authority over transportation to authorize pipelines in

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* During the one-year period ending January 1989, ONG sold approximately 396,000 Mcf of gas to Firestone.

> interstate commerce to construct and operate the facilities necessary to make direct sales, including transactions involving issues of distributor by-pass. In some instances, the Commission denied requests for direct sales that would by-pass a distributor; in others, it approved the proposal, *depending on the circumstances of the case and the factors bearing on the public interest. The final rule does nothing to change this* . . . .

Order No. 436-A, *supra*. (Emphasis added.)

In upholding the OEC procedures, the Court was comforted by the fact that the presumption created by the Commission in Order No. 436 that certification would be in the public interest was rebuttable. *Associated Gas Distributors v. FERC*, 824 F.2d at 1037.

The Court noted specifically:

> Moreover, the Commission expressly states that in an OEC proceeding it will not allow onto the agenda certain issues formerly cognizable *in § 7 hearings*: duplication of facilities, the problem of cost-shifting in a bypassed distributors rates, or impact on local interests generally. FERC Supp. Brief at 6, 8". (*Id.* at 1032; Emphasis supplied).

The Commission here appears to be putting applications to construct facilities to bypass distributors into the class of OEC certificates, contrary to its announced position to the Court. Here, the issues which the Court noted were "cognizable in § 7 hearings" are some of the very issues ONG has raised. The Commission's change in position is neither fully explained nor is it justifiable.

The policy which the Commission has followed in this case and others* is a departure from the long-standing

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* See *e.g.*, *Kansas Power and Light Company v. Williams Natural Gas Company*, 45 FERC ¶ 61,272 (1988), *reh'g denied*, 46 FERC

practice of the Commission to favor LDC service. There is no substantive record evidence here which supports the 180° turn by the Commission and the rationale provided inadequate. The Commission's ruling simply is not based on reasoned decisionmaking. *Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 412 U.S. 800, 808, 37 L.Ed. 2d 350, 93 S.Ct. 2367 (1973) (agency must provide a reasoned explanation for any failure to adhere to its own precedents).

The Commission Erred In Failing To Find that Williams' Proposal Is Purely Local In Nature

In its protest to Williams' application, ONG argued that the facilities proposed by Williams are subject to local rather than FERC jurisdiction. The gas will be produced, sold, transported and consumed in Oklahoma.*

¶ 61,—— (February 23, 1989); *Cascade Natural Gas Company v. Northwest Pipeline Corporation, et al.*, 44 FERC ¶ 61,081 (1988), Order Denying Rehearing in Part and Granting Rehearing in Part, 49 FERC ¶ 61,287 (1988); *Panhandle Eastern Pipe Line Company, et al.*, Opinion No. 275, 39 FERC ¶ 61,274 (1987); *aff'd in part and rev'd in part*, Opinion No. 279-A, 40 FERC ¶ 61,220 (1987); *reh'g granted in part and denied in part*, Opinion No. 275-B, 42 FERC ¶ 61,076 (1988).

* The Commission found (mimeo, p. 8, fn. 15) that "the fact that the molecules of gas actually delivered to PowerSmith will originate in Oklahoma does alter our view" that the lateral will be an essential and integral element of the interstate transportation of natural gas. The Commission thus acknowledged that all of the gas used by PowerSmith will be produced, transported and consumed without ever leaving Oklahoma. The suggestion that "the transportation will be carried out by means of a backhaul arrangement that calls for gas to be delivered to WNG at a number of designated receipt points (some in Kansas and Wyoming) and commingled with the interstate stream of gas in WNG's system", really is of no moment. The *fact* is that none of the gas to be used in *this* transaction will come from any but the limited sources in Oklahoma leading to the new lateral line distributing gas to PowerSmith. The rest is an easy fiction, since none of the gas will be "backhauled" to PowerSmith. The gas is directly hauled to it. And

The Commission found that the facilities proposed by Williams are within its jurisdiction. It found, contrary to ONG's assertion, that the proposed lateral will not be connected to gathering facilities in that it will interconnect with Williams' Cement Pipeline, which, the Commission states, "is a high-pressure 16-inch line capable of transporting large volumes of gas. Its primary function is to transport gas that has been gathered from various fields in western Oklahoma to WNG's interstate system for transmission to points both in and out of Oklahoma".

As shown on Attachment A to ONG's Motion to Intervene, Protest and Motion to Dismiss, the Commission is wrong. The fact that it is a 16-inch line is totally immaterial to the issue of whether this is a gathering line or a transmission line, as is the fact that it is a high-pressure line. The line runs in a west to east direction, picking up gas from the Sterling field, the Cement field, the East Miles field, the Tuttle-East field, and producing wells along the way. The centralized point of delivery is at the Williams main pipeline, which runs in a north-south direction near the Northeast Norman field and is located east of the point of interconnection with the proposed 12.4 mile line. Behind that point, the Williams system serves the function of a gathering system. The Commission has made a finding that it does not, without giving ONG an opportunity at a hearing to demonstrate the fact that it is a gathering system and not a transmission facility. The only evidence of record is the map which ONG submitted and which is not detailed enough to permit a conclusion that it is a transmission line. Indeed, that map would lead to the conclusion that this

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a review of the list of receipt points shows that virtually all of them are in Oklahoma (only 6 of 413 of those receipt points are *not* in Oklahoma—5 in Kansas, one in Wyoming. The "maximum daily quantity" of gas behind those receipt points is extremely minimal). There is no evidence to show that Ladd has any gas behind the six points listed in Kansas and Wyoming, or, for that matter, behind any of the other points.

line serves a gathering function. In a Section 7 certificate case, the applicant has the burden to support its proposal. It did not do so in this regard. Given the opportunity to develop the facts in a proper hearing, ONG would show that the line serves a gathering function. This is critical because if the delivery is made from a gathering line, it becomes even more apparent that the delivery is not in interstate commerce.

In any number of cases, the Commission has found that a high pressure, large diameter line can serve a gathering function.* The fact that this is a 16-inch high pressure line does not predetermine that it is not a gathering line. Whether or not this line is a gathering line is a question of material fact in this proceeding, which has not been determined based upon any evidence of the record.

When enacting the NGA, 15 U.S.C. § 717 *et seq.*, Congress created a dual state-federal regulatory scheme over natural gas. The manifest purpose in enacting the NGA was to close regulatory gaps by complementing and strengthening state regulation. *See Panhandle Eastern Pipe Line Co. v. Indiana Public Service Comm.*, 332 U.S. 507 (1947). Moreover, "Congress did not desire comprehensive federal regulation; much authority was reserved for the States . . . ." *Transcontinental Gas Pipe Line Corp. v. Federal Power Comm.*, 365 U.S. 1, 19 (1961).

Section 1(b) of the NGA, 15 U.S.C. § 717(b) provides:

> (b) *The provisions of this Act* shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or

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* See, *e.g.*, *Shell Gas Pipeline Company*, 41 FERC ¶ 61,032 (1987) (finding 27 mile long, 16-inch diameter, 1350 p.s.i. Pipeline to be gathering).

> sale, but *shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution* or to the production or gathering of natural gas. (Emphasis added.)

Thus, while Congress made sales for resale and the transportation of natural gas in interstate commerce subject to federal regulation, Congress expressly withheld from federal regulatory jurisdiction all other transportation of natural gas.

Since the proposed direct natural gas service by Williams to PowerSmith involves the "local distribution of natural gas," such distribution is beyond the regulatory jurisdiction of the Commission since Congress, under Section 1(b) of the NGA, reserved the same to the States.

The bypass of the existing utility, as proposed in this case, presents a situation of essentially local concern and of vital interest to the State of Oklahoma. As the U.S. Supreme Court has noted:

> It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases . . . . [S]uch a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. *This is not compelled by the Natural Gas Act* or the Commerce Clause of the Constitution.

Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm., 341 U.S. 329, 337 (1951). (Emphasis added).

That this may involve the transportation rather than the sale of gas is of no real consequence, even were this transportation to be considered in interstate, rather than intrastate, commerce. At some point the "interstate"

transportation ends and transportation or distribution in the local market takes place. That may be only for an instant,* but for that time and at that place the transportation is subject to local—OCC—jurisdiction. This approach comports with the scheme of regulation envisioned by the Congress and recognized by the Court in *Panhandle v. Michigan, supra.* In this way, the state is able "to manage essentially local aspects of its business". The Commission has been consistent in finding otherwise (mimeo, pp. 7-8) and the Commission has been consistent in its error. ONG submits that it is time for the Commission to take a fresh look at the question and to recognize that in the federal/state compact, there is a need to recognize the state's interest in protecting *all* of its consumers. There is a need for this Commission to recognize the reason for the policy preferring service to end-users by distributors, which policy was adopted and maintained even though the same potential for "competition" existed in earlier years as exists today. Distributors serve a valid function in providing gas supplies—by sales or transportation—to *all* consumers and not just a select few, and the only way they can do it economically is by continuing to serve large commercial and industrial markets, which pipelines can selectively pick off. The Commission's failure to recognize this need is error.

The Commission Erred In Failing To Set This Matter For A Hearing

It is axiomatic that the Commission must hold a hearing when material facts necessary for the Commission to reach a reasoned decision are in dispute.

ONG has raised numerous issues which deal with questions of material fact. In addition to those discussed

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* See *Transwestern Pipeline Company,* Docket No. RP88-198-006, order issued February 24, 1989 (*mimeo,* p. 11), where the Commission found that a suspension "only for an instant" served the same function as a one-day or five-month suspension.

above, including the benefits vs. detriments to the public of this proposal, ONG has questioned (1) whether the applicant is proposing to obtain the certificate solely for the purpose of obtaining condemnation rights and, if so, whether this is consistent with Commission policy? (2) whether competition was stifled in a situation where General Electric Company, which supplied the gas turbines to PowerSmith, also owns Ladd, the company which is selling the gas to PowerSmith, *i.e.*, whether there was a tying arrangement to these transactions? (3) whether there is a more feasible alternative, presented by ONG's proposal to serve PowerSmith, which better serves the public interest? (4) what was the purpose of option agreements entered into by the parties *after* the application for a certificate was filed in this case? (5) if the Commission had considered the arguments in the supplement to ONG's protest, would the Commission's response have been different? That supplement contained additional information previously not available to the Commission and, because the filing was ignored by the Commission, that information was not before it (see mimeo, pp. 5-6). Can the Commission understand the purport of that additional information if it will not grant a hearing where the effect of it may be explored? (6) is it appropriate to issue a certificate where there is no evidence that there is a gas supply to support the arrangement? The Commission states, in effect, that as long as there is a contract to sell gas by a marketer, the public interest is served. Ignored are questions of (a) security of service, (b) reliance by other consumers on this service, which the Commission has found (erroneously, we believe) to benefit them, (c) what "protection" (mimeo, p. 9) a contract will provide if there is no gas behind it, *i.e.*, will money damages run the PowerSmith plant or serve steam to Firestone or electric power to OG&E? (d) what effect might failure of this project have upon other consumers, if Williams has built the plant and there is no gas to move through the facility? (e) has the Commission effectively rejected its

long-standing policy of requiring Section 7 certificate authorizations for new service to have a gas supply to back them up?*

Each of these questions raises material issues of fact—not policy or law—which should be answered when the Commission acts to protect consumers under its Natural Gas Act powers. The Commission has wide discretion to decide whether or not to set a given matter for hearing; however, its actions may not be arbitrary. If there are material issues of fact, a hearing is required. *Citizens for Allegan County v. FPC*, 414 F.2d 1125 (1969). To meet the requirement that the Commission has engaged in rational decisionmaking, it must demonstrate a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Association v. State Farm Mutuals Ins. Co.*, 493 U.S. 43 (1983). In this case, the Commission had no factual foundation for its conclusions. The Commission erred in failing to set this proceeding for a hearing and failed to elicit the facts necessary to reach a rational decision.

The Commission Erred By Failing To Defer Action Pending The Results Of A State Court Case

In Oklahoma Natural Gas Company, a Division of ONEOK Inc. v. Smith Cogeneration, Inc., et al., CJ-88-10533, District Court for Oklahoma County, Oklahoma, a Petition for Declaratory Order is pending in which ONG has sought to establish that Williams must first obtain a franchise from the City of Oklahoma City in order to use that city's streets for the transportation and distribution of natural gas. The Presiding Judge, on February 16,

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* See *Kansas Gas Pipe Line*, 2 FPC 28 (1939). See also Section 157.14(a)(10) Exhibit H—Total gas supply data. While that exhibit is specifically directed to a pipeline's gas supply, it connotes the Commission's concern for new investment in facilities and service to a market being backed by adequate gas supplies, to assure that the public interest can be served.

1989, ruled that such a franchise is required of Williams and is expected to issue his written order momentarily.

This action goes directly to the interests of the citizens of Oklahoma City. The Commission should defer its action in this case pending the result of that decision because of its effect on the people most interested in it—the people who must live with its results on a daily basis.

WHEREFORE, ONG respectfully requests the Commission, for the reasons set forth above, to grant rehearing and to deny the request of Williams for a certificate of public convenience and necessity.

Respectfully submitted,

OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK INC.

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Dated: March 1, 1989

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-561

WILLIAMS NATURAL GAS COMPANY and
LADD GAS MARKETING, INC.,
Plaintiffs/Applicants

and

SMITH COGENERATION, INC., and
POWERSMITH COGENERATION PROJECT,
LIMITED PARTNERSHIP,
Intervenors/Applicants.

v.

THE CITY OF OKLAHOMA CITY, and
OKLAHOMA NATURAL GAS COMPANY,
Defendants/Respondents.

BRIEF OF THE FEDERAL ENERGY
REGULATORY COMMISSION AS *AMICUS CURIAE*

[Filed June 22, 1989]

INTEREST OF THE FEDERAL ENERGY
REGULATORY COMMISSION

The Federal Energy Regulatory Commission ("Commission") hereby submits the following statement in support of plaintiffs' and intervenors' joint emergency applicaton for injunctive relief from a state court injunction.

The Commission objects to the state court injunction on the basis that it constitutes an impermissible intrusion into the Commission's exclusive jurisdiction over the transportation of natural gas in interstate commerce under section 1(b) of the Natural Gas Act ("NGA") and, unless overturned, will unlawfully render unenforceable the Commission's orders exercising that jurisdiction.

STATEMENT OF THE ISSUES

Whether the Oklahoma state court erred in (a) ruling that federal law does not preempt the state from requiring that an interstate transporter of natural gas obtain a franchise from local authority for such transportation, and (b) enjoining plaintiff Williams Natural Gas Company ("WNG") from the interstate transportation of gas to an end user until it obtains such a franchise.

STATEMENT OF THE CASE

Intervenors Smith Cogeneration, Inc. and PowerSmith Cogeneration Project (collectively "PowerSmith") entered into an agreement with plaintiff Ladd Gas Marketing, Inc. ("Ladd") to purchase natural gas for its cogeneration facility located on the grounds of the Firestone Tire and Rubber Company plant in Oklahoma City. To transport Ladd's gas to the cogeneration plant, the parties also entered into an agreement with plaintiff WNG to construct a 12.4 mile pipeline extension from its Cement pipeline to the cogeneration plant, and to transport Ladd's gas thereon. WNG's Cement pipeline is a high-pressure 16-inch pipeline, the principle function of which is to transport gas from fields in Oklahoma to WNG's interstate system for ultimate transmission to points inside and outside of Oklahoma.

WNG sought a certificate of public convenience and necessity to perform this construction and transportation from the Commission under section 7(c) of the NGA, 15 U.S.C. 717f(c). Defendant Oklahoma Natural Gas Company ("ONG"), a local distribution company which held

a franchise for gas sales in Oklahoma City and was also an unsuccessful bidder for PowerSmith's gas requirements, opposed the granting of a certificate before the Commission, arguing, *inter alia*, that WNG's extension of service to PowerSmith did not constitute transportation of natural gas in interstate commerce within the meaning of section 1(b) of the NGA. The Commission granted WNG's certificate, and in its Order stated that WNG's Cement pipeline had as its primary purpose the transportation of gas into and out of Oklahoma, and the proposed lateral would, by tying WNG's interstate system directly to an end user, be "an essential and integral element of the interstate transportation of natural gas." Appendix A at p. 7. ONG then sought rehearing of the Commission's order.

At the same time that it was participating in the Commission proceedings, ONG also sought and obtained various types of relief from the District Court of Oklahoma County, State of Oklahoma, the most significant of which was the ruling in issue here. After the Commission issued WNG's certificate, the state court issued a declaratory judgment that unless WNG obtained a franchise from the voters of Oklahoma City to transport gas and to construct its 12.4-mile extension pipeline, it could not lay its pipeline under Oklahoma City streets. To explain its belief that this ruling was not preempted by federal law, the state court stated:

> [T]he issue here is whether "transportation bypass" of ONG [i.e., bypassing ONG's local distribution services to sell gas directly to an end user] is a matter of exclusive federal jurisdiction or is of local concern subjecting such transaction to local regulatory authority.
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> . . . .
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> This Court concludes that "transportation bypass" . . . of ONG's exclusive right to the use of the public streets of Oklahoma City under its franchise con-

> stitutes competition with a franchised public utility, resulting in adverse economic effects on the local utility customers. . . . Such a matter is of legitimate local concern, and the means chosen by the State of Oklahoma is plausibly related to that concern. The Oklahoma Constitutional requirement of a franchise does not have as its central purpose the regulation of matters Congress intended to regulate.

Oklahoma Natural Gas Co. v. *Smith Cogeneration, Inc.*, No. 88-10553, slip op. at 4-5 (Dist. Ct. Okla. Cty., May 19, 1989).

Subsequent to the issuance of the state court judgment, the Commission denied ONG's request for rehearing of its earlier order granting the certificate, stating its view that the state court's determination was erroneous, since under section 1(b) of the NGA the Commission had exclusive jurisdiction over WNG's pipeline construction application. It also rejected ONG's claim that the granting of the certificate to WNG would cause ONG to lose both Firestone and PowerSmith as customers and, in consequence, raise its rates to its other customers, stating:

> ONG has lost an opportunity to serve a new customer—PowerSmith. While ONG and its customers will lose the benefits of serving this customer, ONG will be no worse off as it has never served PowerSmith. Further, ONG has not presented any evidence that the proposal will result in ONG's claimed loss of gas sales to Firestone. We find that ONG's allegation of losing gas sales to Firestone is merely speculative.

Appendix B at p. 7. The Commission also reiterated the position taken in its earlier order (*see* Appendix A) that the public interest was best served, not by shielding local distribution companies from competition, but by allowing market forces to prevail, absent any unfair competition. *Id.*

The injunctive relief here sought was triggered by the refusal, on an abstention principle, of the U.S. District Court for the District of Oklahoma to overturn the rulings of the state court.

ARGUMENT

I. THE STATE COURT'S RULING CONFLICTS WITH THE NGA'S EXCLUSIVE GRANT OF JURISDICTION TO THE COMMISSION OVER THE TRANSPORTATION OF NATURAL GAS IN INTERSTATE COMMERCE, AND THUS MUST BE OVERTURNED.

Section 1(b) of the NGA, 15 U.S.C. 717(b) "provides for exclusive Federal Energy Regulatory Commission (FERC) jurisdiction over 'the transportation of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale . . . and . . . natural gas companies engaged in such transportation or sale.'" *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kansas*, —— U.S. ——, No. 86-1856, slip op. at 10 (March 6, 1989). As the Supreme Court has further made clear, in light of these provisions of the NGA, a state scheme of regulation fails when it is "directed at . . . the control of rates and facilities of natural gas companies [since those] are precisely the things over which FERC has comprehensive authority." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 99 L.Ed. 2d 316, 330 (1988). The state's effort to control the activities of the interstate pipeline involved here is similarly beyond its power.

This plenary grant of jurisdiction by Congress over the "transportation of natural gas in interstate commerce" has preempted the kind of state regulation of this field that would occur, should this Court uphold the state court's ruling. As the Supreme Court recently stated:

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. . . . In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation . . . or where the state law at issue conflicts with federal law, either because it is impossible to comply with both . . . *or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.*

Northwest Central Pipeline Corp. v. *State Corporation Comm'n of Kansas*, *supra* (slip op. at 10) (emphasis added, citations omitted); *see also Schneidewind*, *supra*, 99 L.Ed.2d at 325.[1]

Here, the Commission's Order "Granting Certificate" and Order "Denying Rehearing" (attached hereto as Appendices A and B) have plainly determined that WNG's construction of a pipeline extension to serve PowerSmith and its effectuation of that service would meet the public convenience and necessity, as required by section 7(c) of the NGA. Equally plain is the fact that the state court's action has prevented WNG from constructing the pipeline and commencing service.[2] The

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[1] For the Court's convenience we have appended hereto as Appendix C our recent brief filed in a case currently pending in the D.C. Circuit elaborating in detail the legal principles and relevant authorities on which we rest our claims of exclusive federal authority over, as here, "transportation bypass." *Michigan Consolidated Gas Co.* v. *Federal Energy Regulatory Commission*, No. 88-106 (D.C. Cir.).

[2] While it may be argued that the state court's ruling does not entirely prevent WNG from constructing its pipeline, but merely requires that WNG obtain a franchise from the voters of Oklahoma City, the fact that the Oklahoma City voters could choose not to grant the franchise constitutes the kind of potential for collision

state court has thus interfered with, and indeed nullified, the Commission's exercise of the authority and duty conferred on it by Congress, and such interference should not be permitted to stand.

II. THE COMMISSION, NOT THE STATE COURT, IS THE PROPER FORUM FOR RESOLUTION OF POLICY CONCERNS.

In its response to plaintiffs' and intervenors' joint emergency application for relief, ONG states that public policy considerations require that this Court not disturb the state court's injunction. ONG argues that as a local distribution company, it is required to serve all Oklahoma City customers, both high-revenue customers such as PowerSmith, and low-revenue customers such as residential users. If, the argument continues, WNG and Ladd can take away one of ONG's high-revenue customers, ONG will be forced to increase its rates to its other customers; thus, permitting the construction of WNG's pipeline will end by adversely affecting the public. These claims are flawed.

First, we emphasize that the Commission, not the state court, is the proper forum for resolution of this kind of policy question. And, as noted earlier, ONG did raise this issue in the Commission proceedings. The Commission considered it, and rejected it as constituting a less serious potential harm to the public than the alternative

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between state and federal regulation that, according to *Schneidewind*, requires federal preemption.

> When a state regulation "affect[s] the ability of [the Commission] to regulate comprehensively . . . the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act" or presents the "prospect of interference with the federal regulatory power," then the state law may be pre-empted even though "collision between the state and federal regulation may not be an inevitable consequence."

Schneidewind, supra, 99 L.Ed.2d at 331-332, citations omitted.

—*i.e.*, prohibiting free competition between ONG and other gas suppliers. ONG has appealed the Commission's orders here to the U.S. Court of Appeals for the D.C. Circuit (*Oklahoma Natural Gas Co.* v. *FERC*, No. 89-1376, filed on June 12, 1989). ONG should not, therefore, be permitted to evade this proper resolution of its concerns by an end run to an inappropriate state forum. *See Mississippi Power and Light* v. *Mississippi*, —— U.S. ——, 108 S.Ct. 2428 (1988).

Second, the state of Oklahoma is not without other remedies at its disposal to address the difficulties predicted by ONG. If, as ONG claims, its high-revenue customers in effect subsidize its low-revenue customers, the state could formalize this subsidy process by other means. As the D.C. Circuit said when faced with a similar policy concern:

> For example . . . a state is free to tax gas sales to industrial customers and apply the proceeds to whatever subsidies it likes. This may be more awkward than the present arrangement, in which a state commission may attune its rate rulings to the price elasticity of each purchasing firm. But to say that is only to say that the present arrangement allows states to employ extraordinarily ad hoc means to finance subsidy programs. . . . [I]t is hard to see anything in the NGA that guarantees states the right to use such means. . . .
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> . . . .
>
> [The Commission also] argues that the [state] commissions may protect the captive consumers by modifying rate designs so that [local distribution company] shareholders, rather than ratepayers, bear the consequences of [the company's] inability to handle competition.

Associated Gas Distributors v. *FERC*, 824 F.2d 981, 1036 (D.C. Cir. 1987), *cert. den.*, —— U.S. ——, 108 S.Ct. 1468 (1988).

ONG should not be permitted to obscure the central issue here—the state court's usurpation of federal jurisdiction—with this policy-based argument. Such an argument is properly made in the U.S. Court of Appeals on a challenge to the Commission's orders as arbitrary, capricious, or otherwise constituting an abuse of discretion. As noted above, ONG has appealed the Commission's orders to the D.C. Circuit, and that court will, therefore, have occasion to adjudicate this policy question. The instant proceeding initiated in state court, however, instead invokes state jurisdictional authority which, as we have shown, has no basis in the law.

CONCLUSION

For the reasons stated, the Commission supports plaintiffs and intervenors in seeking emergency injunctive relief from the erroneous determination of the Oklahoma state court, which conflicts with the Commission's lawful exercise of its established authority.

Respectfully submitted,

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